

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Grand Canyon Trust, et al.,
10 Plaintiffs,
11 v.
12 Michael Williams, et al.,
13 Defendants.
14

No. CV-13-08045-PCT-DGC

ORDER

15 Defendants have filed a partial motion to dismiss. Doc. 71. The motion is fully
16 briefed (Docs. 118, 120, 123), and the Court heard oral argument on August 1, 2014. For
17 the reasons stated below, the Court will deny the motion.

18 **I. Background.**

19 This case arises out of renewed operations of the Canyon Uranium Mine (“Canyon
20 Mine”). The Canyon Mine is located six miles south of Grand Canyon National Park in
21 the Kaibab National Forest, and four miles north of Red Butte, a religiously significant
22 site for Plaintiff Havasupai Tribe. Doc. 115, ¶¶ 2, 49.

23 In 1984, Energy Fuels Nuclear (“EFN”) proposed to develop two unpatented
24 mining claims in the area. *Id.*, ¶ 29. In 1986, the Forest Service, after preparing an
25 Environmental Impact Statement (“EIS”), issued a Record of Decision (“ROD”)
26 approving a Plan of Operations for the mine. *Id.*, ¶ 30. Several administrative appeals
27 were filed, and the Deputy Regional Forester and Chief of the Forest Service each
28 affirmed the ROD after a full review of the record. In 1988, the Havasupai Tribe

1 challenged the Forest Service’s approval of the Canyon Mine in this Court. *Id.*, ¶ 35.
2 The Court found in favor of the Forest Service on all claims, *Havasupai Tribe v. United*
3 *States*, 752 F. Supp. 1471 (D. Ariz. 1990), and the Ninth Circuit affirmed, *Havasupai*
4 *Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991). Surface structures were built and the
5 mine shaft was constructed to a depth of 50 feet, but EFN placed the mine on standby
6 status when uranium prices dropped in 1992. Doc. 115, ¶ 37.

7 The Federal Land Policy and Management Act (“FLPMA”) authorizes the
8 Secretary of the Interior to withdraw public lands from mining operations. 43 U.S.C.
9 § 1714(a). On July 21, 2009, the Secretary published notice of his intent “to withdraw
10 approximately 633,547 acres of public lands and 360,002 acres of National Forest System
11 lands for up to 20 years from location and entry under the Mining Law of 1872.” Notice
12 of Proposed Withdrawal, 74 Fed. Reg. 35,887. Over the next two years, the Department
13 of Interior (“DOI”) undertook extensive study and preparation of an EIS and ROD to
14 finalize a permanent withdrawal in the area. In 2010, the U.S. Geological Survey issued
15 an evaluation of the uranium mining impacts in the proposed withdrawal area. Doc. 115,
16 ¶ 48.

17 In September 2011, Energy Fuels Resources Inc. (“Energy Fuels”), which had
18 acquired the Canyon Mine from EFN, informed the Forest Service that it intended to
19 reopen the mine under the original Plan of Operations.¹ *Id.*, ¶ 50. In January 2012, DOI
20 withdrew more than 1,000,000 acres from mineral location and entry for 20 years, subject
21 to valid existing mineral rights (“the Withdrawal”). *Id.*, ¶ 54. Land covered by the
22 Withdrawal included the Canyon Mine. One month after the Withdrawal, the Forest
23 Service completed an evaluation and concluded that valid existing mineral rights
24 (“VERs”) existed for the two claims at Canyon Mine as of the date of the Withdrawal
25 (the “VER Determination”). *Id.*, ¶ 58. In June 2012, the Forest Service concluded that
26 neither a modification of the 1986 Plan of Operations nor a supplemental EIS under
27

28 ¹ For a time, the mine owner was known as Dennison Mines. For ease of
reference, the Court will simply refer to the mine owner after 2011 as “Energy Fuels.”

1 NEPA were required for the Canyon Mine to resume operations. *Id.*, ¶ 62.

2 Plaintiffs brought suit in March 2013, challenging the government's approval of
3 renewed operations at Canyon Mine. Doc. 1. On June 13, 2013, Defendants moved to
4 dismiss Plaintiffs' claims for lack of subject matter jurisdiction and also sought dismissal
5 of certain claims on the basis of res judicata and the statute of limitations. Doc. 71.
6 Plaintiffs moved to stay consideration of the motion to allow discovery on jurisdictional
7 defenses. The Court granted the motion to stay and allowed Plaintiffs a "reasonable but
8 limited opportunity to develop additional facts to support their jurisdictional arguments."
9 Doc. 85. Discovery and briefing on the jurisdictional issues was completed on May 19,
10 2014.

11 **II. Legal Standard.**

12 A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction
13 "may be facial or factual. In a facial attack, the challenger asserts that the allegations
14 contained in a complaint are insufficient on their face to invoke federal jurisdiction. By
15 contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
16 themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v.*
17 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242
18 (9th Cir. 2000)) (citation omitted).

19 Defendants' motion has become a factual attack on jurisdiction. In resolving such
20 an attack, the Court "may review evidence beyond the complaint without converting the
21 motion to dismiss to a motion for summary judgment." *Safe Air for Everyone*, 373 F.3d
22 at 1039; *see also Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The
23 Court may not resolve genuine factual disputes if jurisdictional and substantive issues are
24 intertwined. *See Augustine*, 704 F.2d at 1077; *Roberts v. Corrothers*, 812 F.2d 1173,
25 1177 (9th Cir. 1987). Instead, the Court must find that jurisdiction exists and address the
26 motion to dismiss as a motion for summary judgment attacking the merits of Plaintiff's
27 case. *See Safe Air for Everyone*, 373 F.3d at 1039-40, n.3. The Court need not presume
28 the truthfulness of Plaintiff's allegations. *Id.* at 1039 (citing *Savage v. Glendale Union*

1 *High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003), *White*, 227 F.3d at 1242). Plaintiffs
 2 have the burden of establishing subject matter jurisdiction. *Safe Air for Everyone*, 373
 3 F.3d at 1039.

4 **III. Analysis.**

5 Plaintiffs' claims are brought under the Administrative Procedures Act ("APA").
 6 Defendants argue that some of the claims should be dismissed because they do not
 7 challenge a "final agency action" as required by § 704 of the APA. 5 U.S.C. § 704. This
 8 includes Plaintiffs' assertion in Claim 1 of the amended complaint that a supplemental
 9 EIS should have been performed under NEPA before the VER Determination issued,
 10 their assertion in Claim 2 that Defendants failed to comply with § 106 of the National
 11 Historic Preservation Act ("NHPA") before completing the VER Determination, and
 12 their assertion in Claim 4 that the VER Determination was arbitrary because the Forest
 13 Service ignored relevant economic factors. Doc. 115.²

14 **A. Claims 1 and 4.**

15 Because judicial review under the APA applies only to final agency actions, 5
 16 U.S.C. § 704, the Court must decide whether the VER Determination is a final agency
 17 action. There are two components to this inquiry. First, the Court must decide whether
 18 the VER Determination is an "agency action" within the meaning of the APA. An
 19 agency action "includes the whole or a part of an agency rule, order, license, sanction,
 20 relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Second,
 21 if the VER Determination is an agency action, the Court must decide whether it is a final
 22 agency action. To be considered a final agency action under the APA, the two prongs of
 23 the test established in *Bennett v. Spear*, 520 U.S. 154 (1997), must be satisfied. "First,
 24 the action must mark the 'consummation' of the agency's decisionmaking process – it
 25 must not be of a merely tentative or interlocutory nature. Second, the action must be one

26
 27 ² Defendants' motion to dismiss, which was filed before the amended complaint,
 28 challenged Claims 1, 2, 3, 4, 6, 7, and 8 of the original complaint. On April 4, 2014,
 Plaintiffs filed an amended complaint and reduced their claims from eight to four.
 Doc. 115. The motion to dismiss applies to Claims 1, 2, and 4 of the amended complaint.

1 by which rights or obligations have been determined, or from which legal consequences
 2 will flow.” *Id.* (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S.
 3 103, 113 (1948); *Port of Boston Marine Terminal Ass’n. v. Rederiaktiebolaget*
 4 *Transatlantic*, 400 U.S. 62, 71 (1970) (internal quotes omitted)). The Court will address
 5 these requirements in turn.

6 **1. Agency Action.**

7 Plaintiffs argue that the VER Determination is an agency action because it is both
 8 a “license” and a “relief” within the statutory definition of “agency action” in the APA.
 9 5 U.S.C. § 551. They argue that it was legally required under the FLPMA before Canyon
 10 Mine could restart in the Withdrawal area. Doc. 126 at 18-19. Although Defendants’
 11 position was not entirely clear in their briefing, counsel for the government agreed at oral
 12 argument that the VER Determination is an agency action.

13 The Court also agrees. The VER Determination constituted the Forest Service’s
 14 conclusion that Energy Fuels had valid existing mineral rights at the Canyon Mine site.
 15 This action falls squarely within the APA definition of agency action as including “the
 16 whole or a part” of any agency “relief.” 5 U.S.C. § 551(13). “Relief,” in turn, is defined
 17 as “recognition” of a “claim” or “right.” § 551(11)(B). The VER Determination
 18 constituted the Forest Service’s recognition of valid mineral rights and of a valid claim to
 19 such rights at the Canyon Mine. The determination falls within the definition of relief,
 20 and therefore within the definition of agency action.

21 **2. Bennett Part 1: Consummation.**

22 Plaintiffs contend that the VER Determination constitutes the Forest Service’s
 23 final decision on the validity of mineral rights at Canyon Mine and therefore satisfies the
 24 first prong of the *Bennett* test. Defendants argue that the determination is not a
 25 consummation of the agency’s decisionmaking process, but rather a preliminary step,
 26 with additional processes required before the Forest Service could revoke or invalidate a
 27 Plan of Operations. Doc. 71 at 21-22; Doc. 123 at 6. They argue that the final decision
 28 on operation of the Canyon Mine was the Plan of Operations and the 1986 ROD.

1 Doc. 71 at 22-23.

2 The first part of the *Bennett* test asks whether the action marks the consummation
3 of the agency's decision making process. *Bennett*, 520 U.S. at 177-78. As the Ninth
4 Circuit has explained, "we look to see whether the agency 'has rendered its *last word* on
5 the matter.'" *Oregon Natural Resources Ass'n v. U.S. Forest Service*, 465 F.3d 977, 984
6 (9th Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001)
7 (emphasis added).

8 In its order denying a preliminary injunction, the Court found that the VER
9 Determination is the last action the Forest Service can take on the validity of the Canyon
10 Mine claims and therefore satisfies the first requirement of the *Bennett* test. Doc. 86 at 9-
11 10. The Court continues to hold this view. Although it is true that the Forest Service
12 does not have the power to invalidate mineral rights at the Canyon Mine (that
13 responsibility lies with DOI) and that its VER Determination would simply constitute
14 evidence in any proceeding on the legal validity of the mineral rights, the fact remains
15 that the VER Determination is the Forest Service's "last word" on the validity of the
16 Canyon Mine mineral rights. No additional Forest Service action is planned on this issue.

17 Defendants argue that the Forest Service retains discretion to conduct a VER
18 Determination at any time and that the Bureau of Land Management, a different agency,
19 may conduct its own inquiry into the validity. Doc. 123 at 12. As Plaintiffs note,
20 however, the fact that the Forest Service or some other agency have discretion to take
21 action in the future does not negate the fact that the VER Determination is a final action
22 by the Forest Service. *See Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983); *Alaska v.*
23 *EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (decision consummated agency process even if
24 agency may adopt new position in response to changed circumstances); *see also U.S. Air*
25 *Tour Ass'n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002) ("if the possibility . . . of future
26 revision in fact could make agency action non-final as a matter of law, then it would be
27 hard to imagine when any agency rule . . . would ever be final as a matter of law").

28 The Court concludes that the first element of the *Bennett* test is satisfied. The

1 VER Determination was not merely tentative or interlocutory in nature, it was the Forest
2 Service's last word on the validity of mineral rights at the Canyon Mine. It marked the
3 consummation of the Forest Service's validity determination.

4 **3. *Bennett* Part 2: Legal or Practical Effect.**

5 In its preliminary injunction ruling, the Court found that Plaintiffs were unlikely to
6 satisfy the second prong of the *Bennett* test because the VER Determination did not
7 augment any rights or obligations related to Canyon Mine; it merely recognized rights
8 that existed at the time of the Withdrawal. Doc. 86 at 12. Having reviewed factual
9 materials submitted by the parties and having read more cases concerning the second
10 prong of the *Bennett* test, the Court now reaches a different conclusion.

11 In *Bennett*, the Supreme Court explained that the second prong is satisfied if the
12 action is "one by which rights or obligations have been determined, or from which legal
13 consequences will flow." 520 U.S. at 178 (quotation marks and citation omitted). Other
14 cases shed light on this requirement. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992),
15 the Supreme Court explained that the "core question" is whether the result of the agency
16 action "is one that will directly affect the parties." *Id.* at 797. Although *Franklin* was
17 decided before *Bennett*, the Ninth Circuit quoted this language from *Franklin* in *Oregon*
18 *Natural Desert Ass'n*. 465 F.3d at 982. The Ninth Circuit went on to explain that courts
19 should look to whether the agency action "amounts to a definitive statement of the
20 agency's position" or whether it "has a direct and immediate effect on the day-to-day
21 operations of the subject party." *Id.* (quotation marks and citation omitted). The Ninth
22 Circuit said the focus should be "on the practical and legal effects of the agency action,"
23 and that the finality element must be interpreted "in a pragmatic and flexible manner."
24 *Id.* (quotation marks and citations omitted).

25 The factual materials presented by the parties show that completion of the VER
26 Determination was, at least, a practical requirement before the Canyon Mine resumed
27 operations. On September 23, 2011, the Forest Supervisor responsible for the Canyon
28 Mine, Michael Williams, wrote a letter to the executive vice president of Energy Fuels.

1 Mr. Williams explained that “[a] mineral exam is scheduled to determine if your company
2 has valid existing rights for the Canyon Mine location. *This is a requirement* for any
3 public domain lands managed by the Forest Service that have been withdrawn from
4 mineral entry[.]” Doc. 126-12 at 1 (emphasis added).

5 In a conference call with the Kaibab Paiute Tribe on January 10, 2012, in which
6 Mr. Williams participated, an employee of the Forest Service explained that “the mineral
7 exam will need to be completed before they start work at the Canyon Mine.” Doc. 118-
8 15 at 1. The next day, in a telephone conversation with the Hualapai Tribe, Mr. Williams
9 stated that the owners of Canyon Mine “would not be able to move forward without VER
10 under the mineral withdrawal.” Doc. 118-18 at 1.

11 Even more important than these communications, however, are Forest Service’s
12 repeated statements in the VER Determination itself that the determination was required
13 for renewed operation of the mine: “It is Forest Service policy (FSN2803.5) to only
14 allow operations on mining claims within a withdrawal that have valid existing rights
15 (VER).” Doc.126-3 at 5. This statement is repeated on the next page. *Id.* at 6. Two
16 pages later, the VER Determination states that “[d]ue to the withdrawal, all locatable
17 operations within this area must have valid existing rights (VER) in order to be able to
18 operate on these claims.” *Id.* at 8.

19 As authority for these statements, the VER Determination cites “FSN2803.5,”
20 which is a section in the Forest Service Manual, specifically in “Chapter – Zero Code.”
21 Paragraph 5 of section 2803 of the Manual states that the Forest Service should “[e]nsure
22 that valid existing rights have been established before allowing mineral or energy
23 activities in congressionally designated or other withdrawn areas.” FOREST SERVICE,
24 FOREST SERVICE MANUAL, FSM 2800 – MINERALS & GEOLOGY, § 2803 (2012).

25 Other communications make clear that Energy Fuels did not intend to proceed
26 with renewed mine operations until the VER Determination was finished. A letter from
27 Energy Fuels’ executive vice president to Forest Service employees concerning the
28 process of the VER Determination stated: “We would like to get the sample analysis

1 turned around as early as possible so that we can hopefully close this out and proceed
2 with our production plans.” Doc. 118-16 at 1. An email from a Forest Service employee
3 to representatives of the Kaibab Paiute Tribe, sent the day after the January 10, 2012
4 conference call mentioned above, contained this statement: “I called our geologist, and
5 was told that [Energy Fuels] will not be doing any ‘shaft sinking’ at the site until the
6 mineral exam is completed.” Doc. 126-13 at 1.

7 Whether or not the law required Energy Fuels to wait until the VER Determination
8 was completed, these communications clearly show that the Forest Service, Energy Fuels,
9 and interested tribes all understood that mine operations would not resume until the VER
10 Determination was completed. It was a practical if not a legal requirement. And as noted
11 above, the Ninth Circuit has instructed that courts should “focus on the practical and legal
12 effects of the agency action.” *Oregon Natural Desert Ass’n*, 456 F.3d at 982. The
13 Supreme Court’s direction that the “core question” is “whether the result of that process
14 is one that will directly affect the parties,” *Franklin*, 505 U.S. at 797, is also relevant.
15 The documents quoted above make clear that the VER Determination directly affected
16 the parties – Canyon Mine operations would not resume until the determination was
17 completed.³

18 The difficult question for the Court is whether a practical effect alone is sufficient
19 to satisfy the second prong of the *Bennett* test. *Bennett* itself seems to require legal
20 consequences, referring to actions “by which rights or obligations have been determined,
21 or from which legal consequences will flow,” 520 U.S. at 178, and most cases discussing
22 this prong focus on the legal effects of an agency action. Plaintiffs have identified little
23 legal effect from the VER Determination – it does not create mineral rights, but merely
24

25
26 ³ In an affidavit submitted with the preliminary injunction briefing, the executive
27 vice president of Energy Fuels states that the Forest Service asked Energy Fuels to hold
28 off on resuming mining activities “on a voluntary basis” until the VER Determination
was completed, and that Energy Fuels voluntarily agreed. Doc. 59 ¶¶ 15-16. Accepting
this statement as true, the Court nonetheless concludes that the practical effect of the
VER Determination was to forestall new operations at the mine until the determination
was finished.

1 confirms they already exist; it is not required by the FLPMA or the Withdrawal,⁴
 2 although the Forest Service Manual does seem to suggest that it is necessary before
 3 mining operations may occur on withdrawn lands; and Plaintiffs have identified no
 4 specific *legal* consequences that flow from the determination itself. And yet the Ninth
 5 Circuit clearly states that the Court should take not only a legal, but also a “practical” and
 6 “pragmatic” look at the VER Determination. *Oregon Natural Desert Ass’n*, 465 F.3d at
 7 982. Other cases agree. *See, e.g., Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8,
 8 15 (D.C. Cir. 2005) (“Finality resulting from the practical effect of an ostensibly non-
 9 binding agency proclamation is a concept we have recognized in the past.”); *Gen. Elec.*
 10 *Co. v. Env’tl Prot. Agency*, 290 F.3d 377, 383 (D.C.Cir.2002) (“if the language of the
 11 document is such that private parties can rely on it as a norm or safe harbor by which to
 12 shape their actions, it can be binding as a practical matter”). Viewing the VER
 13 Determination from a practical point of view, the Court finds that it not only “amounts to
 14 a definitive statement of the agency’s position” on the validity of the Canyon Mine
 15 mineral rights, but that it also had “a direct and immediate effect on the day-to-day
 16 operations of the subject party” – once issued, it allowed mining operations to resume
 17 under the original Plan of Operations. *Id.* The Court therefore concludes that the VER
 18 Determination satisfies the second prong of the *Bennett* test.

19 This conclusion is reinforced by the fact that the VER Determination seems to fall
 20 within the actual language of *Bennett*. One of the circumstances identified by *Bennett* as
 21 satisfying the second prong is when “rights or obligations have been determined.” 520
 22 U.S. at 178. The purpose of the VER Determination was to determine rights – the
 23 existence of valid mineral rights at the Canyon Mine site. The VER Determination thus
 24 appears to come within the express language of *Bennett*.

25
 26
 27 ⁴ Plaintiffs cite to language in the FLPMA and the Withdrawal stating that the
 28 Withdrawal is subject to “valid existing rights.” *See, e.g.,* Doc. 126 at 22 (citing Doc.
 126-3 at 8; 43 U.S.C. § 1702(j)). But there is a difference between valid existing rights
 and a valid existing rights determination, and neither the statute nor the Withdrawal
 requires a determination.

1 **4. Conclusion for Claims 1 and 4.**

2 The Court concludes that the VER Determination is an agency action that satisfies
3 both prongs of the *Bennett* test. As a result, it is a final agency action within the meaning
4 of 5 U.S.C. § 704, and the Court has jurisdiction to review Claims 1 and 4.

5 **B. Claim 2.**

6 Claim 2 asserts that Defendants failed to comply with § 106 of the NHPA before
7 completing the VER Determination. Section 106 provides:

8 The head of any . . . Federal department or independent agency having
9 authority to license any *undertaking* shall, prior to the *approval* of the
10 expenditure of any Federal funds on the undertaking or prior to the issuance
11 of any *license*, as the case may be, take into account the effect of the
12 undertaking on any district, site, building, structure, or object that is
included in or eligible for inclusion in the National Register.

13
14 16 U.S.C. § 470f (emphasis added). Plaintiffs argue that the Canyon Mine is an
15 “undertaking” and that the VER Determination is an “approval” or “license” within the
16 meaning of this section. As a result, Plaintiffs contend, the Forest Service was obligated
17 to comply with this section before completing the VER Determination.

18 Several issues are raised by this claim: (1) whether the Canyon Mine is a
19 “undertaking” within the meaning of § 106; (2) whether the VER Determination
20 constitutes an “approval” or “license” within the meaning of the section; (3) whether
21 consultation under this section would constitute a “final agency action,” the omission of
22 which can be reviewed by a court under the APA; and (4) whether the claim is barred by
23 res judicata, the statute of limitations, or laches.

24 **1. Undertaking, Approval, or License.**

25 In the Court’s view, the parties’ briefing does not fully and clearly address
26 whether the Canyon Mine is an undertaking for purposes of § 106 or whether the VER
27 Determination is an approval or license within the meaning of this section. In addition,
28 these issues are closely related to the merits of Claim 2. The Court accordingly will defer

1 consideration of these issues until the merits phase of this case.

2 **2. Final Agency Action.**

3 The “final agency action” requirement of § 704 of the APA applies whether a
 4 plaintiff seeks to “compel agency action unlawfully withheld or unreasonably delayed”
 5 under § 706(1) or to “hold unlawful and set aside agency action” under § 706(2). The
 6 claim asserted in Claim 2 is the former – a failure to act claim under § 706(1). Doc. 115,
 7 ¶ 83.⁵ In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (“*SUWA*”),
 8 the Supreme Court held that such a claim “can proceed only where a plaintiff asserts that
 9 an agency failed to take a *discrete* agency action that it is *required to take*.” *Id.* at 64
 10 (emphasis in original). *SUWA* focused on what constituted a *discrete* agency action that
 11 could be compelled under §706(1) of the APA, but also recognized that “[w]here no other
 12 statute provides a private right of action, the “agency action” complained of must be
 13 “*final* agency action.” *Id.* at 62-63 (emphasis in original).

14 The omitted action in Claim 2 is not the VER Determination, but the Forest
 15 Service’s alleged failure to engage in the consultation process required by § 106 of the
 16 NHPA. Plaintiffs can assert this claim under the APA only if consultation under § 106
 17 would have been a final agency action. *Id.*

18 While the parties have not identified and the Court has not found any authority
 19 explicitly addressing whether compliance with § 106 is itself a final agency action, the
 20 Ninth Circuit has reviewed agency compliance with the § 106 consultation requirement in
 21 the past. *See, e.g., Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep’t of Interior*,
 22 608 F.3d 592, 607-10 (9th Cir. 2010); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177
 23 F.3d 800, 805-807 (9th Cir. 1999). Additionally, Plaintiffs asserted at oral argument that
 24 the result of a § 106 consultation likely would have been a memorandum of agreement
 25 (“MOA”) that clearly would have legally binding effect.

26 The statute’s regulations support this assertion. They suggest that an agency

27
 28 ⁵ Although the amended complaint is not entirely clear on this point, counsel confirmed during oral argument that Claim 2 asserts only a failure to act claim based on noncompliance with § 106 of the NHPA.

1 should complete an MOA to show compliance with § 106 whenever adverse effects on
2 properties are found. *See* 36 C.F.R. § 800.6(a) (requiring consultation with Indian tribes
3 to develop and evaluate alternatives to avoid, minimize, or mitigate adverse effects on
4 historic properties); § 800.6(c) (noting that an MOA evidences compliance with § 106).
5 They also show that an MOA has legal force – parties to an MOA must comply with its
6 terms. § 800.6(c). Indeed, in *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000), the Ninth
7 Circuit held that an MOA between an agency and city, which resulted from a § 106
8 consultation, was legally binding and enforceable by third-party beneficiary homeowners.

9 It appears that not every § 106 consultation results in an MOA. The regulations
10 imply that an MOA is required only when the agency’s consultation identifies potential
11 adverse effects on historic properties. The fact that consultation might not produce an
12 MOA does not, however, alter the conclusion that § 106 consultation qualifies for judicial
13 review. In *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 948 F.2d 1436,
14 1445 (5th Cir. 1991), the Fifth Circuit reviewed an agency’s obligation to consult under
15 § 106 for a project that was almost complete. Although the result of consultation under
16 § 106 was unknown, and the process might not have resulted in issuance of an MOA, the
17 court held that “as long as the park project is under federal license and the Corps has the
18 ability to require changes that could conceivably mitigate any adverse impact . . . NHPA
19 review is required.” *Id.* at 1445. Other cases likewise “require that NHPA be applied to
20 ongoing Federal actions as long as a Federal agency has opportunity to exercise authority
21 at any stage of an undertaking where alterations might be made to modify its impact on
22 historic preservation goals.” *Id.* at 1444-45 (citing *Morris County Trust for Historic*
23 *Pres. v. Pierce*, 714 F.2d 271, 280 (3rd Cir.1983); *Waterbury Action to Conserve Our*
24 *Heritage, Inc. v. Harris*, 603 F.2d 310, (2d Cir.); *Thompson v. Fugate*, 347 F.Supp. 120,
25 124 (E.D.Va.1972)).

26 Consultation with Plaintiff Havasupai Tribe in this case might well have resulted
27 in a legally enforceable MOA. The Court concludes that such a consultation would be a
28 final agency action under the two prongs of *Bennett*: (1) completion of the consultation

1 would constitute the culmination of the agency's action under the NHPA with respect to
 2 the Canyon Mine, and (2) the process could produce an MOA with legally enforceable
 3 effects. *See Bennett*, 520 U.S. at 177-78.

4 Because the Court finds that a § 106 consultation would qualify as a final agency
 5 action, the Court concludes that Plaintiffs may use the APA to challenge the Forest
 6 Service's failure to conduct the consultation. 5 U.S.C. § 706(1).

7 **3. Res Judicata.**

8 Federal Defendants argue that Claim 2 is barred by res judicata because it alleges
 9 essentially the same NHPA cause of action that Plaintiffs 'might' have pursued" in their
 10 prior litigation challenging the 1986 ROD. Doc. 71 at 24 (citing *Havasupai Tribe*, 752 F.
 11 Supp. 1471). "The doctrine of *res judicata* provides that 'a final judgment on the merits
 12 bars further claims by parties or their privies based on the same cause of action.'" *In re*
 13 *Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (quoting *Montana v. United States*, 440
 14 U.S. 147, 153 (1979)). Thus, res judicata applies whenever there is (1) an identity of
 15 claims, (2) a final judgment on the merits, and (3) privity between parties. *Tahoe-Sierra*
 16 *Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir.
 17 2003).

18 Defendants argue that the "identity of claims" requirement is satisfied because
 19 Claim 2 is "essentially the same" as claims asserted in the earlier action. Doc. 71 at 24.
 20 But the earlier claims challenged approval of the 1986 Plan of Operations for violating
 21 the Tribe's right to free exercise of religion and a consultative duty under NEPA.
 22 *Havasupai Tribe*, 752 F. Supp. 1471. Claim 2 asserts a failure to comply with § 106 of
 23 the NHPA for a cultural property that was not designated a TCP until 2010. That
 24 designation had not occurred at the time of the prior suit and could not have been the
 25 subject of a § 106 claim. Thus, Claim 2 is not the same as the claims brought in the
 26 earlier action, nor could it have been brought in that action. Because there is no identity
 27 of claims between the prior case and Claim 2, res judicata does not apply.

4. Statute of Limitations and Laches.

Defendants argue that Claim 2 is barred by the statute of limitations and laches because the 1986 ROD is the only agency decision that authorized mining at Canyon Mine, and any claims challenging continued mining should have been brought within six years of the ROD. Doc. 71 at 24-25 (citing 28 U.S.C. § 2401(a)). But Claim 2 asserts that the VER Determination triggered the agency's obligations under § 106 of the NHPA, and the statute of limitations would not have begun to run for this claim until the VER Determination was issued in 2012 or the Forest Service failed to engage in § 106 consultation as part of that determination. Because those events occurred well within the six-year limitations period in 28 U.S.C. § 2401(a), Claim 2 is not barred by the statute of limitations. For the same reason, it is not barred by the doctrine of laches.

IT IS ORDERED that Defendants' partial motion to dismiss (Doc. 71) is **denied**.

Dated this 7th day of August, 2014.

David G. Campbell

David G. Campbell
United States District Judge